Nos. 460, 461

In the Supreme Court of the United States

OCTOBER TERM, 1942

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SOUTHERN ASSOCIATION OF BELL TELEPHONE EMPLOYEES

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 336–343) is reported in 129 F. (2d) 410. The findings of fact, conclusions of law, and order of the Board (R. 99–121) are reported in 35 N. L. R. B. 621.

JURISDICTION

The petition for writs of certiorari was granted on November 16, 1942 (R. 345). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and upon Section 10 (e) and (f) of the National Labor Relations Act (hereinafter called the Act).

QUESTIONS PRESENTED

1. Whether there is substantial evidence to support the findings of the Board that the Southern Bell Telephone and Telegraph Company dominated, interfered with, and supported a labor organization of its employees.

2. If question 1 be answered in the affirmative, whether the Board properly required the Company to withdraw recognition from and disestablish such labor organization.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

STATEMENT

Upon the usual proceedings pursuant to Section 10 of the Act, the Board issued its findings of fact, conclusions of law, and order (R. 99–121). The Board's findings and the supporting evidence are set out fully in the Argument, *infra*, pp. 10–28. In brief outline, the findings may be summarized as follows.

From 1919 until 1935 the Southern Bell Telephone and Telegraph Company, hereinafter called the Company, maintained throughout the nine Southern States in which the Company operates, a concededly employer-dominated and supported labor organization known as the Southern Association of Bell Telephone Employees, hereinafter called the Association (R. 102, 103, 114–115). In April and May 1935, when passage of the Act seemed imminent, the Association, in a canvass of all the Company's employees, conducted on Company time and property and at Company expense, raised about $5,000 to enable it to continue after enactment of the Act (R. 103–104, 108–109). After the Act became effective, the Company issued a bulletin to its employees stating that the Company would continue, as it had before, but with certain minor exceptions, to pay the salaries of Association officials and furnish to the Association facilities, and would continue to deal with the Association (R. 105, 108–109). The leaders of the Association, Askew, its president, Weil, its vice president, and Mrs. Wilkes, its secretary, held positions with the Company which identified them in the eyes of the employees as management representatives and rendered the Company responsible for their activities in the Association (R. 104, 106). Although in the months following the adoption of the Act these officers effected minor revisions in the constitution of the Association, it continued thereafter with the same name and substantially the

same leadership (R. 105–110, 115). The Company executed a collective bargaining contract with the Association and granted it a check-off of dues before the revised constitution had been ratified by the employees and before any of the employees had signed cards for membership in the revised Association (R. 105–107, 115). Until 1937, also, the Company gave the Association direct financial assistance by granting it free use of Company property and facilities, and permitting Association representatives to meet for some purposes during working hours without loss of pay (R. 108). In 1937 these forms of support were withdrawn (R. 110–112, 115). However, for several years thereafter, Weil and Mrs. Wilkes, for whose acts in the Association the Company is responsible, continued as leaders of the Association; Weil was president from 1935 until 1939, and vice president in 1940, Mrs. Wilkes was secretary-treasurer from 1935 until 1938 and vice president-treasurer from 1938 until 1939 (R. 104, 106, 109–110, 115).

Late in 1940, the International Brotherhood of Electrical Workers, affiliated with the American Federation of Labor (hereinafter called the Union), began to seek members among the Company's employees at its Shreveport, Louisiana, office (R. 117). Thereafter a supervisor in that office disparaged the Union to two employees and advocated the Association, and another supervisor

asserted it was a "shame" the Company could not discharge its "dissatisfied" employees, referring to Union adherents (R. 117–118).

In February 1941, after the Union had filed charges with the Board initiating these proceedings, the Association arranged for a signed poll of its members to determine whether they desired to "continue" their Association membership and whether they wished the Association to represent them (R. 100, 113–114, 116). Pending the canvass, the Association advised the Company that it would not act as bargaining agent, and the Company "noted" the Association's advice in that regard and posted notices of the employees' rights under the Act and its own neutrality (R. 113–114, 115–116). A large majority of the employees voted "yes" to the questions propounded on the signed ballot (R. 114, 116), whereupon the Company recognized the Association as the "authorized collective bargaining agent" and resumed bargaining relations with it pursuant to a current exclusive bargaining contract which had never been considered to have lapsed (R. 114, 113).

The Board found that the Association, which originated under company sponsorship in 1919, continued after the Act, substantially unchanged, and without any "line of fracture" (R. 115). It further found that the Company, by recognizing and dealing with the Association, after the effective date of the Act, perpetuated its sponsor-

ship, domination, and support of the Association, thereby denying its employees their right to organize for collective bargaining free from interference or restraint by their employer (R. 108–109, 114, 115–116). The Board, therefore, found that the employees' selection of the Association did not reflect their free choice (R. 115–116). It concluded that after the effective date of the Act the Company had dominated, interfered with, and supported the Association in violation of Section 8 (2) of the Act, and had engaged in interference, restraint, and coercion, in violation of Section 8 (1) (R. 116–118). The Board also found that complete disestablishment of the Association was necessary to restore freedom of choice to the employees (R. 115–116, 118); accordingly, in addition to the usual cease and desist and posting of notices requirements, it ordered the Company to withdraw recognition from and completely disestablish the Association as collective bargaining representative of its employees (R. 119–120).

Thereafter, the Company and the Association filed separate petitions in the court below to review and set aside the Board's order (R. 1–2, 6–13). The Board answered, requesting enforcement of its order against the Company (R. 4–5, 14–17). On June 30, 1942, the court handed down its opinion and entered its judgments setting aside the Board's order in its entirety (R. 336–344). The Board filed a petition for writs of certiorari

on October 15, 1942,[1] and on November 16, 1942, the petition was granted (R. 345).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In not holding that the following findings of the Board were supported by substantial evidence and were therefore conclusive under Section 10 (e) and (f) of the Act:

(a) That the Company dominated, interfered with, and supported the Association, in violation of Section 8 (2) of the Act;

(b) That thereby and in other ways the Company engaged in interference, restraint, and coercion in violation of Section 8 (1) of the Act.

2. In holding that the Board could not find that an employer who after the effective date of the Act recognized and dealt with a labor organization, which was a mere revision of a union admittedly company-dominated prior to the Act, had thereby unlawfully dominated and supported such labor organization.

3. In setting aside and denying enforcement to the Board's order.

SUMMARY OF ARGUMENT

The Board's findings that the Company dominated and interfered with the administration of the Association and contributed financial and other

[1] An order extending the time within which to file the petition for 15 days from September 30, 1942, was signed by a Justice of this Court on September 23, 1942 (R. 344–345).

support to it in violation of Section 8 (1) and (2) of the Act are supported by substantial evidence. The Association was unquestionably company sponsored, dominated and supported prior to July 1935, when the Act was passed. After that time the Company continued to contribute support in violation of the Act, and at the same time signed a contract manifesting its recognition of the Association. Recognition after the effective date of the Act of a labor organization formed under Company sponsorship and maintained for 16 years entirely by Company financing was an act by which the Company imposed upon its employees a labor organization neither freely formed, administered nor chosen by them. Thus, after the Act went into effect, the Company perpetuated its prior domination of the Association, thereby violating Section 8 (2).

The revision of the constitution of the Association after this contract had been signed did not establish a new organization. Under the revised charter, the Association had the same name, the same structure, and the same officers, and there did not purport to be any break in the organizational continuity. Nor did the employees regard it as a new organization. On the contrary, both the Company and the Association repeatedly emphasized that the Association was continuing, with merely a change in its method of financing.

Between 1935 and 1937 the Company continued

to give the Association financial and other support, though not as extensively as before. After 1937 and until 1939 the president and secretary-treasurer of the Association continued to be persons whose positions with the Company, as well as their long leadership prior to the Act in a company-sponsored labor organization, marked them in the eyes of the employees as management representatives.

In these circumstances the Board well concluded that the effect of the Company's long history of domination and support of the Association would not be dissipated except by an explicit announcement to the employees that the Company would no longer recognize or deal with that organization. The Board was not required to find that mere general declarations of an intention to comply with the law or a temporary suspension of bargaining while the Association conducted a signed canvass of its members rid the Association of the effects of the prior company support.

The court below erred in holding that full freedom of choice may be restored to employees while an organization established and supported by the employer continues to be recognized as the representative. Such an organization will always enjoy the advantages which the employer's support and interference gave it. Many decisions, including those relied on by respondents, hold that the Board may require the employer definitely to re-

pudiate such an organization in order to wipe the slate clean of the effect of his prior conduct.

The holding of the court below that the validity of the Board's findings and order turned upon whether there was evidence of domination of the Association "at the time of the complaint and hearing" is directly in conflict with the express language of the Act as well as with many decisions of this Court.

ARGUMENT

THE FINDINGS OF THE BOARD CONCERNING THE COMPANY'S UNFAIR LABOR PRACTICES ARE SUPPORTED BY SUBSTANTIAL EVIDENCE, AND THE DISESTABLISHMENT ORDER IS PROPER.

The Board found that the Company had dominated and interfered with the administration of the Association, had contributed financial and other support to it, and had interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act (R. 116, 118). Upon these findings, the Board ordered the Company to cease and desist from its unfair labor practices, and, as affirmative action which the Board found necessary to reestablish freedom of choice among the Company's employees (R. 118), to withdraw recognition from and completely disestablish the Association as a collective bargaining representative (R. 119-120).

The only issues before the court below were whether the Board's findings with respect to the unfair labor practices were supported by substantial evidence, and whether the Board's order was proper. The court below did not indicate its disagreement with any of the Board's underlying findings but, nevertheless, held that the ultimate findings of violations of the Act were "without support in the evidence" (R. 338, 340). And it further held that, in any event, the order of disestablishment, in the circumstances of this case, was an abuse of the Board's discretion (R. 342–343). Accordingly, it set aside the Board's order in its entirety (R. 343).

We shall show that the Board's findings of fact are supported by substantial evidence (pp. 11–28), and that on these facts, the Board's conclusion of domination and interference, in violation of Section 8 (1) and (2) of the Act, and the order of disestablishment, are proper under principles repeatedly approved by this Court (pp. 28–40). Accordingly, we submit, the court below erred in failing to give the Board's findings finality and in declining to enforce its order.

A. THE BOARD'S FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE—

The evidence, as the court below noted (R. 338 note), is "free from substantial conflict," the "disagreement" between the parties being "not over what the record establishes as done and said, but over the Board's conclusions as to the effect under

the Act of what was done and said."[2] We shall first briefly review the underlying findings and the evidence upon which these findings are firmly grounded.[3]

Organization and administration of the Association prior to the Act.—The Association was established in 1919 under the sponsorship of the Company as an advisory agency for adjusting differences with employees within management limitations (R. 103, 114–115; 38, 40).[4] The Association operated through locals in the Company's offices in the nine Southern States through

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[2] Respondent Company has stated that with two exceptions the evidence is free from dispute (Opp. to Pet. p. 2).

[3] In the following statement references preceding the semicolon are to the Board's findings and succeeding references are to the supporting evidence.

[4] During 1919 there were labor disturbances and strikes of employees of the Company in several cities and the Association was organized as a result thereof (R. 122–123). In thus meeting the threat of outside unionism by sponsoring the Association, the Company was following a pattern of anti-unionism prevalent at that time. Economic studies show that in 1918–1919 employers throughout the country sponsored company unions to avoid having their employees join *bona fide* outside unions. Daugherty, *Labor Problems in American Industry* (Rev. Ed. 1938), p. 640. The National Labor Relations Board has considered several such labor organizations established in 1919, and its findings that an employer by continuing after the effective date of the Act to deal with them perpetuated an obstacle to free organization by its employees have been upheld by the courts. *Western Union Telegraph Co.* v. *National Labor Relations Board*, 113 F. (2d) 992 (C. C. A. 2), enforcing 17 N. L. R. B. 34; *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. (2d) 641 (App. D. C.), enforcing 14 N. L. R. B. 539.

which the Company's operations extend (R. 102, 107; 29, 135, 142, Bd. Exh. 4, Art. III, Sec. 1). Applications for membership were not uniformly required of employees (R. 103; 132, 161). No over-all membership list was maintained (R. 103; 139, 145, 156). Until passage of the Act on July 5, 1935, the Association was entirely maintained by the Company's financial support and assistance: it had no funds of its own, all of its expenses, including salaries and necessary disbursements of employees engaged in Association business, were borne by the Company, and it maintained no offices but conducted all of its business on company premises (R. 103, 114–115; 38, 40, 124, 127 132, 135). Company counsel stated at the hearing that up to the date of the Act, the Company "occupied a relation" to the Association that is "prohibited by the Wagner Act" (R. 217).

Events of April to July 1935, when enactment of the Act appeared imminent.—In April and May 1935, in anticipation of passage of the Act, officers of the Association conducted a company-wide canvass of the employees, the announced purpose of which was to secure funds with which the Association or a like successor could operate after the Act went into effect (R. 103; 123–125, 142–143, 212–213, 269).[5] The Company openly

[5] Before the canvass began, Askew, president of the Association, conferred with Dumas, assistant to the vice president of the Company, and obtained the agreement of the Company

approved and supported the canvass by granting Association solicitors leaves of absence with pay, paying their travelling expenses, and making available to them company automobiles, premises, time, and other facilities (R. 103, 108–109; 38, 124–125, 142–143, 201, 212–213). Weil, who was vice president of the Association, as well as a supervisory employee,[4] canvassed Louisiana and Mississippi, holding meetings of employees on company time and premises, telling the employees that enactment of the Act would outlaw the Association, that "quite a few officers of the Association" felt the employees should be represented by

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to finance the canvass (R. 124–125; 212–213, 217). The territory in which the Company operates was divided among the officers of the Association and all of it was systematically canvassed (R. 124). Arrangements were made beforehand so that on the date an officer was to visit a larger town all employees from the smaller exchanges in nearby towns were brought into the larger town to attend the meeting (R. 142–143, 145–146).

[4] Weil had been an officer of the Association continuously since 1929 or 1930 (R. 141). From 1935 to 1939 Weil's position with the Company bore the title of "plant practice supervisor" of the Louisiana Division and included the responsibility for distributing, clarifying and interpreting plant routine instructions from the home office to the appropriate persons in Louisiana (R. 106 note; 140, 177–178, Tr. 257–258). Among those to whom he transmitted and explained instructions were installation foremen (Tr. 257). Upon these facts the Board held that Weil was viewed by the employees as a management representative and that the Company was responsible for his activities in the Association (R. 106 note).

their own organization, and that funds were vital for that purpose (R. 103–104 note; 142–143).[7] Another supervisor, A. F. Bear, district traffic manager at Shreveport, Louisiana, directly assisted the solicitation by addressing an Association meeting held on company time and premises (R. 104; 201). He stated in his address that the Company had supported the Association for 16 years and that the "least" the employees could do was give their contributions because the Company would be "unable to interfere" in the event that "outside" labor unions attempted to organize the workers (R. 104; 201–203). The campaign resulted in a fund of approximately $5,000, part of which was received by the Association after the Act went into effect (R. 104, 108–109; 127, 269, 272).

Since the Association had never theretofore had a treasury or treasurer, the money was turned over to Mrs. Jane Wilkes, general secretary of the Association, who was for this purpose appointed acting treasurer (R. 104; 126, 132, 192). Mrs. Wilkes' position with the Company, that of secretary to the general commercial manager, was such as to identify her in the eyes of the employees as a representative of management and

[7] Weil spent 10 days canvassing Louisiana and Mississippi (R. 142). The Company paid his full salary and all his expenses during those 10 days (R. 143).

render the Company responsible for her activities in the Association (R. 104; 189–190).[8]

The Company's statement to employees upon the passage of the Act.—Following the effective date of the Act, the Company did not advise the employees that it would no longer recognize or deal with the Association as their collective bargaining agent (R. 108, 115; 220, 236). To the contrary, on July 20, 1935, the Company issued to the employees a written bulletin entitled "Memorandum—Wagner Bill Interpretations," beginning as follows: "The Company can continue to pay salaries of Association officers who are filling their regular jobs and doing Association work incidental to their regular duties." The bulletin went on to recite: "The Company can continue to pay the salaries of Association officers while engaged in conferring with management and while they are meeting among themselves before or after these conferences to discuss their presentation or disposition of the matters involved"; "The Association may continue to use Company premises for their meetings without charge"; "The Association may use Company typewriters and other office facilities when such

[8] The nature of her relationship to the management is made clear by the fact that from the position of secretary to the general commercial manager she was next promoted to the position of personnel supervisor over the Company's entire nine-state territory (R. 104; 189–190). She had been an officer of the Association since 1931 (R. 191–192).

is incidental to the regular Company use of these facilities" (R. 105; 284). While the bulk of the bulletin was given over to a recital that the foregoing aspects of the Company's relationship with the Association would continue as before, it did state that the Company could not pay travelling expenses, could not bear the expense of stamps, stationery and supplies nor provide space for the full time use of the Association without proper charge. The bulletin also stated that "all Management Representatives are anxious to cooperate and will endeavor to meet Association officers at such times and places as will be most convenient and economical." Aside from its title, the bulletin made no mention of the Wagner Act. Nowhere did it tell the employees of their rights under the Act nor did it make mention of the fact that the Act rendered illegal any of the Company's former practices. Rather, as the Board found, it was an announcement by the Company to the employees that the Association would continue to exist and function after the Act, with Company aid and cooperation (R. 108, 115).

In addition to the foregoing bulletin issued by the Company, each employee received a letter from the president of the Association, Askew, who at that time was and for many years had been the company cashier for the State of Georgia, a position which, of course, identified him in the eyes of the employees as a management

representative (R. 104; 122, 130, 269–272, Bd. Exh. 3).[9] The letter was dated July 12, 1935 (R. 172; 269). It stated that the Association in its drive for money to finance the continuance of the Association had collected approximately $5,000 (R. 104; 269–272). It recited that the enactment of the Act does "not affect the status of our Association" except respecting the shifting of expenses from the Company to employees, and told of the assurances given by the Company's vice president, who due to the president's illness was acting chief executive, that the Company would continue to deal with the Association and that "the management wished to cooperate with the Association in every way possible" (R. 104; 269–272).

At about the same time the Company's supervisory employees did transmit orally and third hand to the employees a statement of the Company's vice president that the Company intended to pursue a "hands-off" policy in compliance with the Act (R. 104–105, 108; 133–134, 196, 214–215, 221–222, 229–230).[10] The Board found that the

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[9] Askew had been general secretary of the Association from January 1920 until March 1928, chairman of the Association's Judiciary Committee from 1930 until 1933, and president since 1933 (R. 123). He had been State Cashier since 1929 (R. 122, 131); prior thereto he had been supervisor of the Company's mailing bureau (R. 131). See also note 11, p. 20, *infra*.

[10] The supervisors acted pursuant to instructions which were transmitted to them by their own superiors in the Com-

oral declarations of the supervisors made under these circumstances did not suffice to restore to the employees full freedom of choice with respect to organization for collective bargaining (R. 108). Such statements by supervisors were completely overshadowed by the concurrent written notices which made it clear that the Company would continue to support and deal with the Association (R. 108–109).

Revision of the Association's constitution and joint agreement with the Company in 1935.— In August 1935, officials of the Association, utilizing the above-mentioned funds, revised the constitution of the Association and its joint agreement with the Company, retaining the same name and largely the same leadership as before (R. 105–108; 127–130, 141, 143–145, 190–191, 269–272, 291–300). The manner in which the revision was effected discloses, and everything

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pany hierarchy, and which these superiors in turn received from the Company's high-ranking officials (R. 104–105; 195–196, 214–216). The instructions were issued by Company Vice-President Warren on July 16, 1935, at a meeting of these officials, at which were also present by invitation, the Association's president and its general secretary, and at which Warren read certain portions of the Act, and declared that under the Act the Company was required to cease "financial or other support" of the Association, that the employees had the right to select their own representatives for collective bargaining, that the Company must exercise a "hands-off" policy, and that it was the Company's intention to comply with the law (R. 104; 133–134, 196, 214–216). Warren was then acting chief executive of the Company. He succeeded to the presidency in August 1935 (R. 104; 229).

which was said and done in connection with it, deliberately emphasized to the employees, the continued existence of the Association. For example, the revisions of the constitution and joint agreement were drafted by a committee of the General Assembly, the governing body of the Association, which met at Association President Askew's call in the Company's Atlanta office (R. 105; 128–130, 143, 286–288). Dumas, assistant to the Company's vice-president, assured the committee that should the changed joint agreement be approved by the Association, the Company would enter into it, and would also check off dues for the Association (R. 105; 144, 148, 212–214). The revised constitution and joint agreement were thereafter approved by the Association General Assembly at a special meeting called for the stated purpose of formulating "plans for financing and *continuing* this organization in accordance with the provisions of the Wagner Labor Relations Bill" (R. 105–106; 129–130, 275, 281–282).[11] Dumas addressed this meeting stating that in order to spare the Association the expense, the Management would no longer utilize regular As-

[11] After he had taken a leading part in initiating the revision of the constitution, Askew resigned from the presidency of the Association and was succeeded by the vice president, Weil; he continued as a member of the Association, however, until 1939, when he resigned because he was considered by the employees to be a supervisory employee, although his position had been the same since 1929 (R. 104, 105–106; 123, 129–131, 141–142, 144–145, 275–276).

sociation meetings "for discussions of sales, safety practices, etc.," but "where the Management wished to use the facilities of the Association to broadcast information these meetings would be considered strictly as special meetings called by Management, the expense of which could be lawfully borne by them" (R. 106; 147, 279).

The revised constitution itself recited, *inter alia,* that the Association had been formed in 1919, that it had been in "continuous operation" since that time, and that the document constituted a "revision * * * superseding" previous revisions of the constitution, the last of which became effective in May 1934 (R. 107, 109; 308).[12] Five years' membership in "the Association" was made a condition of eligibility for the office of president and 1 year's membership was required for holding local office (R. 107; 164, 308).[13]

[12] In 1940, after the Association had retained counsel, the recital of the constitution was changed so as to read that the Association was formed in "1935 * * * supplanting a former organization of employees by the same name" (R. 112–113; 314). Similarly, the minutes of the 1940 annual meeting refer to it as the "5th Annual Meeting," whereas the minutes of the annual meetings between 1936 and 1939 refer to the meetings as the "17th" to "20th Annual Meeting[s]," thus dating the Association back to 1919 (R. 109, 113; 308, 309, 311, 312).

[13] The structure of the Association remained substantially unchanged. It continued to operate through a hierarchy of committees, each local sending a representative to a district board, each district board sending a representative to a state board, and there being above these three other bodies (R. 296–297, Bd. Exh. 4, Art. III, Bd. Exh. 15, Art. III). While

On September 3, 1935 the Company signed a joint agreement with the Association (R. 106; 148, 217, 284–286). The new joint agreement eliminated all references to Company assumption of the expenses of the Association, as provided in the joint agreements theretofore entered into between the Association and the Company (R. 106; 284–286, 299–300). It incorporated a new plan of joint conferences of Association and management representatives for the purpose of settling grievances (R. 106; 284–286, 299–300). At the time the agreement was signed, the revised constitution had not yet been ratified nor had the employees been canvassed concerning their adherence to the Association (R. 106; 149–150, 160–161, 286–288). Indeed the notice from the Association to its members telling them of the revision was not sent out until the day the agreement was signed (R. 106–107; 148, 155–157, 286–288).[14] On September 3, 1935, Weil, as president of the Association, sent a letter to members of the Association, in which he informed them that the officers had prepared a

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the names of several of these bodies were slightly altered, there was no real change in operation (R. 296–297). Indeed, the revised constitution retains the former titles of articles of the constitution and the same arrangement and numbering except for the insertion of an article relating to finances (Bd. Exhs. 4 and 15).

[14] Warren, the Company's president, stated he did not think it was unusual that the Association should be able to show to employees a contract signed before canvassing them concerning their adherence to the Association (R. 106; 236–240).

"revised constitution" for "our Association" and stated that "our employee body, as manifest in your recent special contribution, desires no outside influence in our ranks" (R. 106–107; 157–158, 286–288). Subsequently, other letters were sent out by the officers of the Association explaining that the revision was "an Amendment to your present plan" and that the changes, "while not affecting the operation of our plan, were desirable in that they eliminated many references to the Company" (R. 107; 159–162, 288–300).

On October 1, 1935, Mrs. Wilkes, as secretary of the Association, sent membership applications and check-off authorizations to "Local Chairmen" of the Association for signature by the employees (R. 107; 132, 291–294). In her instructions respecting these documents, she directed the Local Chairman to have the membership applications signed "by each member who desires to *continue* his or her membership in the Association * * *" and "when requesting the present members of your Local to sign the new applications for membership * * * it should be explained that the purpose of the form is to provide the officers of the Association with a complete and uniform record of membership in the Association and *is not to be considered as a new application*" (R. 107; 160–161, 292, italics added). All the communications and transmission of membership applications and check-off authorizations from Mrs. Wilkes to

the Local Chairmen and their return to her, were handled by the Company's inter-office mail facilities (R. 108, 137). The constitution was not ratified until February 1, 1936 (R. 106; 150).[15]

Relationship between Company and Association, 1935–1940.—Although the revised constitution of the Association was not ratified until February 1, 1936, the Company began on November 1, 1935 to check off dues of those employees who signed authorizations (R. 106–107, 115; 150, 218–219, 236–238, 240–241, 252–253).[16] Mrs. Wilkes continued as treasurer, using the same bank and the same account, for Association funds as that in which she deposited the approximately $5,000 collected at about the time the Act was passed (R. 107–108, 109–110; 192, 253–254).

Until 1937, the Company, following the course set forth in the memorandum of "Wagner Bill Interpretations" distributed in July 1935 (*supra*, pp.

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[15] Article XVI of the constitution in effect on July 5, 1935 (Bd. Exh. 4) provided that amendments thereto "shall become effective if ratified by a majority vote of two-thirds of the Locals within 6 months from the date of adoption by the General Assembly" (R. 191). The revisions of the constitution were treated by the Association as amendments, as in fact they were, and the procedure of ratification provided by the foregoing article was followed in securing their adoption (R. 190–191, 289, 295). This procedure was not completed until February 1, 1936 (R. 150).

[16] The Association continued to function under the old constitution until February 1, 1936 (R. 191). No new elections of officers were held until the terms for which they were elected expired in 1936 (R. 153–154, 157–159).

16–17), continued to permit the Association free use of company facilities and property for Association local meetings and other business and allowed Association representatives to meet together for some purposes during working hours without loss of pay (R. 108; 137, 169–173, 200). In January 1937 and April 1937, the Company issued and distributed to the employees revised memoranda containing further "interpretations" of the Act, and pursuant thereto withdrew all remaining forms of direct financial support and the grant of free use of facilities to the Association (R. 110–112, 115; 169–171, 173–176, 309–311).

The leadership of the Association, however, continued until 1939 or 1940 to be in Weil and Mrs. Wilkes, for whose activities in the Association the Company was responsible (R. 104, 106, 109–110, 115; 140–142, 177–178, 189–190, 192). Weil continued as president of the Association until 1939, and was vice president in 1940 (R. 109; 141). Mrs. Wilkes continued as secretary-treasurer until 1938 and was vice president-treasurer in 1938 and 1939 (R. 110; 192).[17]

Opposition of supervisors to the Union.—Late in 1940, the Union began to seek members among the Company's employees at its Shreveport,

[17] Weil continuously held office in the Association from 1930 until 1940 (R. 141); prior to 1923 he had been a local representative (R. 141). Mrs. Wilkes continuously held office from 1931 until 1939 (R. 192).

Louisiana, office, and established a local there in opposition to the Association (R. 117; 209–211). Shortly thereafter, the long distance supervisor in that office, acting upon the suggestion of the District Traffic Manager that she "influence" her "people" against the Union (R. 117; 207), told two subordinates that "we really did not need" the Union, that the Association was "everything that they had or could get," and that the supervisor "did not feel that they would get any better * * * than they did out of the Association" (R. 117; 208). The General Traffic Manager subsequently reprimanded the District Traffic Manager for this, but there is no evidence that the reprimand was made known to the employees generally (R. 117; 243–244). Some months later, the Employment Supervisor in the same office, referring to an employee who had joined the Union, declared that it was a "shame" the Company could not discharge its "dissatisfied" employees (R. 117; 204, 202–203).

Events of February and March 1941.—On December 17, 1940, the Union filed a charge with the Board, and on January 15, 1941, an amended charge, which initiated these proceedings (R. 99–100; 17–18, 50). On February 10, 1941, the Association was informed that the Board was about to issue a complaint alleging that the Association was maintained in violation of the Act. It thereupon wrote Company President Warren, referring

to the imminent Board action and stating that "because such a charge clouds this Association's right to represent the employees of the Company * * * the Association will not undertake to act as their collective bargaining agent pending a canvass of its membership by signed ballot" (R. 113; 316–317). On February 11, 1941, Warren replied, "It is noted that, pending a canvass of your members, you will not undertake to represent the employees of this Company as their collective bargaining agent" (R. 113; 317–318).

The Association thereupon arranged for a signed poll of its members, to determine whether they desired to "continue" their Association membership and whether they wished the Association "to represent [them] in collective bargaining" with the Company (R. 114, 116; 322–333). Meanwhile, the Company posted notices on its bulletin boards setting forth Sections 7 and 8 of the Act and announcing (R. 113–114, 115; 26–27, 232–234, 318–319):

> The Company recognizes its employees' right to join, form or affiliate with any labor organization of their own choice and freely to exercise all rights secured them by this Act.
>
> The Company guarantees its strict compliance with all the provisions of this Act and that no employee will be discriminated against or suffer any other penalty because of his or her exercise of any right secured by this Act.

> The Company is not interested in whether its employees join or do not join any labor organization.

At the same time the Company advised its supervisory staff, but not the employees, of the exchange of letters with the Association, and instructed the staff to refrain from in any way interfering with or influencing the employees in their choice of a bargaining representative (R. 113, 115–116; 318–319).

A large majority of the employees voted "yes" to the questions propounded on the signed ballot (R. 114, 116; 47–49). On February 28, 1941, the Association advised the Company by letter of the results of the canvass, and requested recognition (R. 114; 319–320). After confirming the advice, the Company, on March 6, 1941, recognized the Association as the "authorized collective bargaining agent" (R. 114; 320–334), and thereupon resumed bargaining relations with it pursuant to an existing exclusive bargaining contract dated July 30, 1940, which was not regarded as having been cancelled by the exchange of letters of February 10 and 11, 1941 (R. 113–114; 238–239, 300–304, 334).

B. ON THESE FACTS THE BOARD PROPERLY CONCLUDED THAT THE COMPANY DOMINATED, INTERFERED WITH, AND SUPPORTED THE ASSOCIATION

Upon the foregoing facts the Board's ultimate findings that the Company has since July 5, 1935,

dominated and interfered with the administration of the Association, and contributed financial and other support thereto, in violation of Section 8 (1) and (2) of the Act (R. 116, 119), are clearly supported by substantial evidence.

The Association, as it existed when the Act became effective, was not an organization which could properly function as the collective bargaining representative of the Company's employees. Its initiation under Company sponsorship (see pp. 12–13, *supra*), followed by 16 years of utter financial dependence upon the Company (see pp. 12–15, *supra*), together with the identification in the eyes of its employees of its main officers as management representatives (see pp. 14, 15–16, 17–18, *supra*), made the Association a company-dominated and supported labor organization. While acts of domination, interference and support which occurred prior to the effective date of the Act were not violative of any law and, of course, are not unfair labor practices which the Board may remedy, nevertheless, the conduct of an employer, in continuing to deal with such a labor organization as the representative of its employees after the effective date of the Act, does violate the Act. Both the Board and the courts are entitled to examine the pre-Act history of a labor organization with which an employer deals after the effective date of the Act, for the purpose of determining whether

such labor organization is in fact the lawful and freely chosen representative of the employees.[18]

Here the Company, a week after the Act became effective, announced by written notices to its employees that it would continue to deal with the Association in adjusting questions affecting its employees (pp. 16–17, *supra*). Less than 2 months after the Act became effective it signed a contract with the Association and agreed to check off dues to it (pp. 20, 22, *supra*). At the time these acts occurred the Association had not achieved any financial independence nor had it rid itself of a president and secretary who in the eyes of the employees represented management rather than employee viewpoint (pp. 13–25, *supra*). It is true the Association had in its bank account the sum of $5,000 which had been collected on the eve of the Act's enactment (pp. 15, 19, 24, *supra*). But the Company had paid the full expenses of the canvass to raise this money, and by the cooperation of its officials had lent its coercive weight to the pleas for the donation (pp. 13–15, *supra*). And the Company had announced

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[18] *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 268–270; *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, 273; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 244–248; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 460; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 586, 588.

to its employees, that where Association business was incidental to Company business, officers of the Association would be permitted to continue the use of Company time without deductions from their pay (pp. 16–17, *supra*). Both of the Congressional Committees reporting on the intent of Section 8 (2) of the Act pointed out that this section prohibited bargaining with a labor organization so supported:

> Collective bargaining is reduced to a sham when the employer sits on both sides of the table by supporting a particular organization with which he deals, by * * * permitting such representatives to conduct organizational work among the employees during working hours without deduction of pay.[19]
>
> It seems clear that an organization or a representative or agent paid by the employer for representing employees cannot command, even if deserving it, the full confidence of such employees. And friendly labor relations depend upon absolute confidence on the part of each side in those who represent it.[20]

Thus, by entering into a contract with the Association less than 2 months after the Act became effective, when the Association had neither secured financial independence nor rid itself of

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[19] House Report No. 1147, 74th Cong., 1st Sess., p. 18.

[20] Senate Report No. 573, 74th Cong., 1st Sess., p. 10.

officers who represented management, the Company violated Section 8 (2) of the Act. In so contracting the Company entrenched with its employees, as their collective bargaining representative, the organization it had over the years sponsored and supported.

Contracting with, and thereby recognizing, a company-dominated labor organization, is the usual climax to the sponsoring and supporting of such an organization. It is by such means that the employer realizes the fruits of interference. The signing of a contract carries to a conclusion the building up of the employer's chosen representative for its employees. Indeed, the usual aim in dominating and supporting an organization is to have it rather than some other organization act as the representative of the employees. Only with the signing of a contract is the organization actually firmly entrenched as the representative. And such signing brings home to the employees for the first time the full effect of the domination, interference and support. Their employer is asserting that it has made a contract with the employees through their representative, when in fact the employees have not had their own representative at the bargaining table. This is precisely the type of employer conduct which Section 8 (2) outlaws.

The Company has sought to evade the inevitable logic of the foregoing analysis by contending that

the Association with which it contracted was not in fact the same labor organization as the Association which had existed at its plant prior to the Act. The Company contends that with the enactment of the Act the old Association ceased to exist and in the months following the Act a new Association was formed. However, the evidence reviewed conclusively shows that the Association continued with the same name, the same structure and the same officers, without any break in its organizational continuity.[21] And the Board so found (R. 115). Not only was there in fact a continuance of the same organization, but both the Company and the Association repeatedly emphasized to the employees that the changes made were merely amendments designed to eliminate references to the Company and provide an independent method of financing the Association (see pp. 19–24, *supra*).

It is now firmly established that the Board may find that the continuation in the same or a

[21] Company President Warren testified that the Company never took any steps to dissolve the Association, that he had "no knowledge of any dissolution" of that organization, and that so far as he was aware there has been no "time since 1919 when there wasn't an Association in some form, representing the employee body" (R. 236). Vice-President Dumas testified to similar effect (R. 220). And Association President Weil testified that he believed the passage of the Act *ipso facto* "disbanded" the Association, but that he knew of no "other way" in which it was attempted to dissolve it (R. 147–148).

superficially altered form of "an old plan or organization the original structure or operation of which was not in accordance with the provisions of the law" is an obstruction to the employees' free choice of representative, and that "the effects of the long practice cannot be eliminated and the employees rendered entirely free to act upon their own initiative without the complete disestablishment" of the tainted union. *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U. S. 241, 250, 251; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 270; *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, 275; *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453, 460–461; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 591; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 521, 523; *Westinghouse Electric & Manufacturing Co.* v. *National Labor Relations Board*, 312 U. S. 660, affirming 112 F. (2d) 657, 659–660 (C. C. A. 2). Cf. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 236.[22] The

[22] Similar decisions of the various circuit courts of appeals are too numerous and commonplace to warrant citation. Indeed, the court below has itself eloquently recognized the principle in *National Labor Relations Board* v. *Brown Paper Mill Co.*, 108 F. (2d) 867, 870–871, certiorari denied, 310 U. S. 651. And there has been no case since the *Pennsylvania*

Board properly applied this principle upon the facts of the instant case.

The announcement of the Company to its employees that it would continue to pay salaries of Association officials when their Association duties were incidental to their duties for the Company, and accord the Association facilities such as meeting places (see pp. 16–17, *supra*), made it clear to employees that the Association would continue to be subject to the strong influence necessarily implicit in the acceptance by a bargaining agent of such favors from the party with whom it must deal. Thus the Company not only continued to subject the alleged representative of its employees to the corrupting influence of such support, but flaunted this fact in printed notices to all its employees. Such support continued until 1937 (see pp. 24–25, *supra*), and unquestionably constituted a violation of Section 8 (2) of the Act.[22]

Greyhound case in which disestablishment of a labor organization which has been dominated, interfered with, or supported, has been held inappropriate to effectuate the policies of the Act.

[22] The House Committee on Labor, in commenting on Section 8 (2), quoted with approval a characterization of the employer's payment of employee representatives for time spent in performing duties on behalf of a company union as "the subsidizing of an active group of propagandists among the employees for the type of employee representation the company would prefer to deal with." House Report No. 1147, 74th Cong., 1st Sess., p. 18; cf. Senate Report No. 573, 74th Cong., 1st Sess., p. 10.

Although all payments of officers of the Association for time spent on Association work, and all free use of the Company's property came to an end in 1937, when the Act was held constitutional (see pp. 24–25, *supra*), for several years thereafter the leadership of the Association continued to be in persons whom the Board found represented the management rather than the employees (see pp. 14–16, 25, *supra*). The continuance of Weil as president of the Association until 1939 and as vice president in 1940 (see p. 25, *supra*), and of Mrs. Wilkes as secretary-treasurer in 1938 and 1939 (see p. 25, *supra*), Mrs. Wilkes' position as secretary to the general commercial manager and chief engineer, from 1934 until 1940 when she became the Company's chief personnel officer (see pp. 15–16, *supra*), and Weil's position as plant practice supervisor for the State of Louisiana from 1935 until 1939 (see pp. 14–15, *supra*), placed them in the supervisory class. As the Board found, "their duties allied them more closely with the management of the respondent than with the other employees, and it is reasonable to assume that to such employees they represented the management" (R. 104n., 106n.). Moreover, the fact that Weil continuously since 1930 and Mrs. Wilkes continuously since 1931, each served as an officer of the Association (R. 141, 192) and during the first 5 years of that period was paid by the Company for the time

spent allegedly representing employees,[24] marked each of them as a "company representative."[25] The Board's determination that the Company is responsible for all they did in the Association subsequent to the effective date of the Act (R. 104, 106) is therefore correct. In this additional way the Company continued active domination and interference with the administration of the Association for several years after 1935, thereby violating Section 8 (2) of the Act.

While all the foregoing conduct of the Company, which constituted active domination, interference, and support, came to an end by 1940, in that year, when an outside union appeared at one of the Company's exchanges, the Company, by its super-

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[24] It is to be noted that as late as May 1935 Weil devoted 10 full days to Association affairs and was paid his full salary by the Company, as well as all his expenses, for that time (R. 142–143).

[25] *International Association of Machinists* v. *National Labor Relations Board*, 110 F. (2d) 29, 43, affirmed, 311 U. S. 72, where the Court of Appeals for the District of Columbia said:

> Acme Welfare was a company union. It follows necessarily that its leading promoters were company representatives. Men accustomed to such submission seldom regain independence overnight. * * * All that they did, therefore, is imputable to the company. * * *

The courts have uniformly sustained the Board's finding that the activity of an officer or representative of a company-dominated union in establishing a substitute labor organization similar in personnel and structure to the old binds the employer and subjects the new organization to the infirmities of the old. *Machinists* case, 311 U. S. 72, 78–79, 80–81; *National Labor Relations Board* v. *American Mfg.*

visory employees, warned employees against such a union and urged continued adherence to the Association (see pp. 25–26, *supra*). As the Board found (R. 116, 118), this conduct not only violated Section 8 (1) of the Act but also violated Section 8 (2). Cf. *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 599–600.

The Company's written statement to the Association in February, 1941, that it "noted" that the Association would not "undertake" to act as collective bargaining agent "pending" the canvass (*supra*, pp. 26–27), obviously did not constitute withdrawal of recognition or repudiation of the Association. Although the Association did not bargain during the 24-day period, the pre-existing

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Co., 106 F. (2d) 61, 68 (C. C. A. 2), affirmed, 309 U. S. 629; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 599; *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. (2d) 472, 476, 477 (C. C. A. 3), certiorari denied respecting this part of the case, 310 U. S. 655; *Union Drawn Steel Co.* v. *National Labor Relations Board*, 109 F. (2d) 587, 590–591 (C. C. A. 3); *National Labor Relations Board* v. *Condenser Corp.*, 128 F. (2d) 67, 73 (C. C. A. 3); *National Labor Relations Board* v. *Thompson Products, Inc.*, 130 F. (2d) 363, 367 (C. C. A. 6); *National Labor Relations Board* v. *J. Greenebaum Tanning Co.*, 110 F. (2d) 984, 985–986 (C. C. A. 7), certiorari denied, 311 U. S. 662; *American Smelting & Refining Co.* v. *National Labor Relations Board*, 126 F. (2d) 680, 684, 685 (C. C. A. 8); *Swift & Co.* v. *National Labor Relations Board*, 106 F. (2d) 87, 92, 93, 94, 95 (C. C. A. 10). Cf. *System Federation No. 40* v. *Virginian Ry. Co.*, 11 F. Supp. 621, 627 (E. D. Va.), affirmed, 84 F. (2d) 641 (C. C. A. 4), affirmed, 300 U. S. 515. *A fortiori* the continued activities in the same, rather than a new, organization must be imputable to the employer.

contract remained in force and the letters exchanged between the Association and the Company indicated on their face that relations would be resumed upon successful completion of the poll. It is thus plain that there was no definite or permanent severance of the relations between the parties at this, or any other, time.

In these circumstances, we submit, the Board was clearly entitled to find, as it did (R. 108–109, 115–116), that the Company's mere declarations of neutrality with respect to organizational activities, its general assertions of a purpose to comply with the law, the discontinuance in 1937 of direct overt assistance and support of the Association, and the "noting" in 1941 of the Association's intention to suspend bargaining pending a canvass of its members, did not suffice to restore to the employees that full freedom of self-organization contemplated by the Act. The Board was entitled to conclude that the effects of the Company's long history of domination and support of the Association "could not, under the circumstances, be dissipated except by an explicit announcement to the employees that the [Company] would no longer recognize or deal with the Association. In the absence of such action by the [Company], its employees were not afforded the opportunity to start afresh in organizing for the adjustment of their relations with the employer which they must have if the policies of the Act are to be effectuated" (R. 115–116). Hence, the Board's further conclu-

sion was also proper, that the employees' selection of the Association did not reflect a free choice (R. 116).[36]

Accordingly, the case presents an unmistakable violation of Section 8 (1) and (2) of the Act. The disestablishment order is the normal and judicially approved remedy. See cases cited, *supra*. See also, *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, 262; *National Labor Relations Board* v. *Automotive Maintenance Machinery Co.*, 315 U. S. 282, reversing 116 F. (2d) 350 (C. C. A. 7).[37]

C. THE COURT BELOW ERRED IN SETTING ASIDE AND REFUSING TO ENFORCE THE BOARD'S ORDER

Despite this clear propriety, as we think, of the Board's findings as to the unfair labor practices

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[36] Whether in a particular case, the action taken by the employer is sufficient to reestablish freedom of choice among the employees, is, of course, a question of fact entrusted to the Board for determination. *Westinghouse Electric & Manufacturing Co.* v. *National Labor Relations Board*, 312 U. S. 660, affirming 112 F. (2d) 657 (C. C. A. 2); *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584; *Western Union Telegraph Co.* v. *National Labor Relations Board*, 113 F. (2d) 992 (C. C. A. 2). Cf. *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82.

[37] This Court has repeatedly sustained the proposition that perpetuation of a union which is company dominated and supported is not justified by evidence that a majority of the employees desire it to represent them. The *Newport News* case, 308 U. S. at 248, 251; the *Falk* case, 308 U. S. at 455, 460–462; the *Link-Belt* case, 311 U. S. at 587–588; the *Automotive Maintenance* case, 315 U. S. 282.

and of its disestablishment order, the court below held that the findings were "without support in the evidence" and that the order was "not an exercise but an abuse" of the Board's discretion (R. 340). It took the position that the Board was not permitted to find (R. 341)—

> that the Association was and remained tainted and could not represent the employees because there had been no sufficiently clean break away from the old, to establish a new Association, by a complete dissolution and abandonment of the old and a fresh start from scratch;

but that the Board was required to consider the case (R. 342)—

> from the standpoint of the effect of the evidence to establish that at the time of the complaint and hearing, the Association was dominated or fostered by the Company, and there was therefore not a free choice of the employees * * *.

Examined from this standpoint, the court declared, the findings were without support (R. 342). And the court further held that even if the Association had not been "purged" of company support, it would nevertheless deny enforcement of the Board's order of disestablishment because a majority of the employees had, as the court stated, "freely" chosen the Association as

representative (R. 342–343). We submit that the court plainly erred.[28]

The holdings of the court that the Board was not entitled to find that "complete dissolution and abandonment" of the old Association and "a fresh start from scratch" was a condition precedent necessary to validity of a new organization (R.

[28] The summary of the evidence by the court below gave a completely erroneous picture. The court declared (R. 341):

> The proof makes it completely clear; that since the passage of the Act, the Company and its employees have sedulously endeavored to conform to it, and that except in respect of one or two acts of minor officials, which were promptly repudiated, there has been no departure by the Company or any of its employees from this attitude; that the old Association has been completely superseded by the present one, formed under a new constitution; that the Company, because of the effort at organization of the rival Union, declined to recognize the Association further without an election; and that there was an election with an overwhelming number of the employees, more than four-fifths of the whole, voting for the Association * * *.

But the proof shows, as we have pointed out and the Board found, that the old Association was not "superseded" but continued under a revised constitution with the same name and substantially the same officer personnel (*supra*, pp. 19–25); that the Company did not decline to recognize the Association because of the efforts of the rival Union, but merely "noted" the Association's proposal for temporary suspension of relations pending a canvass (*supra*, p. 27); that the "election" was a signed poll of Association members conducted under the Association's auspices (*supra*, pp. 27–28); and that the anti-Union acts of the Company's officials were never repudiated to the employees (*supra*, p. 26).

341), that the validity of the Association turned, instead, upon whether it was "dominated or fostered" by the Company "at the time of the complaint and hearing" (R. 342), and that even if the Association had not been "purged" of company support, its disestablishment was improper because the employees had "freely" chosen it as their representative (R. 342–343), all appear to proceed from the same premise. The premise is that full freedom of choice, long thwarted and confined by employer sponsorship, support and domination of an organization, may be restored to employees even though the dominated organization, which typifies and embodies the employer's coercive practices, continues to be recognized by the employer. From this premise the court concludes that at some unspecified point, the cessation of interference by the Company restored such freedom to the Company's employees in the instant case.

Assuming, *arguendo,* that the premise is valid that such freedom may under some circumstances be restored despite continued recognition of the dominated union,[29] we submit that the court below erred in holding, upon the facts of the instant case, that such freedom was reestablished here, and that the Board's contrary conclusion was

[29] We shall show presently that the premise is not tenable (pp. 44–52, *infra*).

therefore without rational basis in the record. We have already shown (*supra,* pp. 35–40) the reasonableness of the Board's conclusion on the facts of this case that, despite the Company's declaration of neutrality and withdrawal of all direct overt support from the Association, freedom of choice was never restored to its employees (R. 108–109, 115–116). Since the Board's findings were reasonable, they were, of course, entitled to finality even though the court may have thought that the Board should have made different findings. *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.,* 316 U. S. 105, and cases there cited; cf. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146.

But more than this, we think that the premise upon which the court proceeded is unsound, and, further, that the court's holding that the unlawful conduct of the employer must be continuing "at the time of the complaint and hearing" is directly contrary to the language of the statute. We shall discuss each of these contentions in turn.

1. *The court's premise that freedom of choice may be reestablished although a company dominated union continues to function and is not disestablished is untenable*

As we have stated, the holding of the court below appears to be based upon the premise that a labor organization which, like the Association, has been formed under the sponsorship of the em-

ployer and has been dominated and supported by him for many years, can be "freely" chosen by the employees, presumably at some time after the overt coercive practices which brought it into existence and sustained it have ceased. This premise, we submit, cannot be supported.

The objects of the practices in which an employer engages when he sponsors and supports a company union, like the Association, are its continued existence and the employees' adherence to it. Such an organization therefore stands and inevitably must stand in the eyes of the employees as the employer's candidate for selection as their collective bargaining agent. It is contrary to reason to assume that at some point in its existence the employees will cease to identify such an organization with the employer who brought about its creation and nurtured and sustained it. Rather, it is entirely probable that to the employees such an organization will always be regarded as the employer's choice, and that it will therefore always enjoy the advantages which that position, the result of the employer's interference, affords it. In the present case, obstruction to full freedom of choice has its origins both in the pre-Act history of the preferred organization and in fresh post-Act domination, interference and support with respect to it. So long as the employer continues to recognize the preferred organization as

the bargaining representatives of its employees, the impairment of employee freedom continues.

The position of the court below is essentially the same as that of the employers in the various cases before this Court, commencing with the *Greyhound* cases, in which the propriety of the disestablishment remedy upon findings of Section 8 (2) violation has been challenged. This Court held in the *Pennsylvania Greyhound* case that the Board may find that the mere continuance of a once company-dominated organization as collective bargaining representative gives it "a marked advantage over any other" (303 U. S. at 267) and hence constitutes a continuing obstacle to self-organization which can only be removed by its complete disestablishment.[30] The propriety of the Board's inference in this regard lies at the very basis of the disestablishment order, and has been universally applied by the Board on Section 8 (2) findings and approved without exception by the courts in hundreds of cases. The holding of the court below denied to the Board power to draw this inference.

It is no answer, as the court below apparently suggests (R. 341–342; see also Company Opposition to Petition for Certiorari, pp. 15–16), that in

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[30] For the history and background of the disestablishment remedy, see this Court's opinion in the *Pennsylvania Greyhound* case, 303 U. S. at 266–268; and the landmark decision in *Texas & N. O. Ry. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548.

the instant case the Company ultimately, in progressive stages, withdrew from the Association all overt and direct financial aid, that it advised the employees of their rights under the Act and asserted its own neutrality, that it may have since committed no further unlawful acts, and that there has been a short period during which, although its contract remained in effect, the Association ceased negotiating with the Company pending a signed vote of the employees who had been subjected to the interference. It does not follow from these facts that the employees have ceased to regard the Association as the product of the Company's sponsorship and the recipient of its support, or that it will cease to enjoy the "marked advantage" which that position necessarily gives it over any other union which may seek the employees' adherence.

Essentially the same contention was made against the disestablishment order in the *Newport News* case (308 U. S. 241). In that case, as this Court stated (308 U. S., at 248), it was uncontradicted—

> that the company has never objected to its employes joining labor unions; that no discrimination has been practiced against them because of their membership in outside unions; and that neither officials nor superior employes * * * have interfered, or attempted to interfere, or use any influence, in connection with the election of representatives.

This Court declared that although by the time of the circuit court's decision, all management control of the company union had ended, the freedom of the employees (308 U. S., at 250, 251)—

> may be obstructed by the existence and recognition by the management of an old plan or organization the original structure or operation of which was not in accordance with the provisions of the law. * * *
>
> * * * * * *
>
> * * * We cannot say that, upon the uncontradicted facts, the Board erred in its conclusion that the purpose of the law could not be attained without complete disestablishment of the existing organization which had been dominated and controlled to a greater or less extent by the respondent.[31] * * *

Closely in point, too, we submit, is the *Falk* case. In that case, the court of appeals, erroneously assuming, as did the court below, that at some point the employees would cease to regard a once company dominated union as the employer's choice, had modified the Board's disestablishment order so as to provide that the employees should be free in a Board-conducted election to select the dominated

[31] The fact that the organization there had originally been structurally defective is no ground for distinction; as the Second Circuit stated, "* * * that was merely an incident, not a test. The theory on which the Supreme Court went, as we understand it, was that an unaffiliated union, known for long to be favored by the employer, carries over an advantage which necessarily vitiates its standing as exclusive bargaining agent." *Western Union Telegraph Co.* v. *National Labor Relations Board*, 113 F. (2d) 992, 996.

union as their representative.[32] This Court overturned the circuit court's modification of the Board's order because it indicated that "while in terms disestablished for the time being, [the company union] was still available for selection by the employees" (308 U. S. at 462). The Court held that (p. 461)—

> the Board justifiably drew the inference that this company-created union could not emancipate itself from habitual subservience to its creator, and that in order to insure employees that complete freedom of choice guaranteed by § 7, Independent must be completely disestablished and kept off the ballot.

See, also, the *Heinz* case, 311 U. S. 514, 522, in which it was unsuccessfully argued that as the employer had recognized and bargained with the Union, it should be "equally free to recognize the Association instead of the Union whenever the former represents a majority of the employees."

The *Westinghouse* case (112 F. (2d) 657 (C. C. A. 2), affirmed 312 U. S. 660), is also closely in point. There the employer had announced in a speech to the old elected representatives that the original plan was to be discontinued,

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[32] The lower court had ordered that the notices required by the Board to be posted should recite that the dominated organization would be disestablished only "until and unless * * * [the] employees freely and of their own choice select" it as representative (106 F. (2d) 454, 456, 457 (C. C. A. 7)).

but failed to make any such disclosure to the employees as a whole. The absence of any such public repudiation of the plan was deemed controlling by the Circuit Court of Appeals. Its opinion states (112 F. (2d), at 660):

> * * * the company did not make any effort to make it plain to the employees generally that the "Independent" was not a revision, or amendment, of the "Plan". On the surface it seemed to be such, for it emanated from the old elected representatives, and that alone established an appearance of continuity between the two. * * *

And the courts have frequently sustained Board findings that an inside union which immediately followed an illegal predecessor and appeared to the employees to succeed it, is subject to the infirmities of the old union, despite the absence of substantial fresh overt acts of domination, assistance, or support. See, e. g., *Sperry Gyroscope Company, Inc.* v. *National Labor Relations Board,* 129 F. (2d) 922 (C. C. A. 2); *Kansas City Power & Light Co.* v. *National Labor Relations Board,* 111 F. (2d) 340, 346–347 (C. C. A. 8); *National Labor Relations Board* v. *Swift & Co.,* 116 F. (2d) 143 (C. C. A. 8); *National Labor Relations Board* v. *Rath Packing Co.,* 123 F. (2d) 684 (C. C. A. 8); *Colorado Fuel & Iron Corp.* v. *National Labor Relations Board,* 121 F. (2d) 165 (C. C. A. 10); *National Labor Relations Board* v.

Colorado Fuel & Iron Corp., decided June 8, 1942, 10 L. R. R. 553, 555 (C. C. A. 10). The holding of the court below is inconsistent with these decisions.

The cases of *A. E. Staley Manufacturing Co.* v. *National Labor Relations Board*, 117 F. (2d) 868 (C. C. A. 7), and *E. I. DuPont De Nemours & Co.* v. *National Labor Relations Board*, 116 F. (2d) 388 (C. C. A. 4), certiorari denied, 313 U. S. 571, cited by the Company in its opposition to the petition for certiorari (p. 9), are not inconsistent with our position here. In each of those cases there were three successive labor organizations, each with a different name and without continuity between the successive organizations. In each, both the first and second organizations had ceased to exist and the employer had notified its employees by printed notice or individual letter to each employee that it would no longer bargain collectively with the second organization (117 F. (2d) at p. 874; 116 F. (2d) at pp. 392–393.[33] In each, the employer lived up to its statement that it would no longer bargain collectively with the second organization. In each case the court held that the em-

[33] In the *DuPont* case, in fact, the employer never thereafter recognized any labor organization (116 F. (2d) at p. 394). In the *Staley* case, a month after dissolution of the second organization and the notice to the employees that the employer would no longer recognize it, the employer recognized a third unrelated labor organization (117 F. (2d) at pp. 874–875).

ployer had disestablished the dominated labor organization and that the employees were therefore entirely free of company influence when they formed the third organization (117 F. (2d) at p. 378; 116 F. (2d) at pp. 396–397).[34] In the instant case there was no disestablishment.

In the present case the Company advised its employees of their rights under the Act and stated that it did not care what union they joined (*supra*, pp. 27–28). But the Association continued to be recognized as bargaining representative, and the Company never notified the workers that it was withdrawing recognition from or discontinuing the Association. That such a definite repudiation is necessary in order to dissipate the effect of an employer's prior and long-continued support is clear under the cases cited above, including those relied on by the Company.

2. *The holding of the court below also violated the direct language of the Act*

The holding of the court below that the validity of the Board's findings and order turned upon whether there was evidence that "at the time of the complaint and hearing" the Association was dom-

[34] *Magnolia Petroleum Company* v. *National Labor Relations Board*, 112 F. (2d) 545 (C. C. A. 5), and *Humble Oil & Refining Co.* v. *National Labor Relations Board*, 113 F. (2d) 85 (C. C. A. 5), also relied upon by respondents below, fall into the same category as the *Staley* and *DuPont* cases; in each there was a definite and public repudiation of the unlawful association as a bargaining agency.

inated by the Company (R. 209), is also directly in conflict with the express language of the Act. Section 10 (c) empowers the Board to enter an order to cease and desist and to take appropriate affirmative action if it "shall be of the opinion that any person * * * *has engaged in* or is engaging in" any unfair labor practice (italics added). The holding of the court below deprives the Board of power to do so unless the violations are found to continue at the time of the complaint and hearing. The Board is entitled to issue a cease and desist order if it finds that any unfair labor practices have in the past been committed. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 230; *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260, and cases there cited.

The power to order affirmative action likewise is not dependent upon the continuance of violation of the Act at the time of the Board's order, although it does depend upon the continued existence of effects of the prior unfair labor practices in such a form as to constitute an obstacle to the full enjoyment by employees of their rights under the Act. This Court has repeatedly held that the Board could find that the continued recognition of a labor organization which had been company sponsored was such an obstacle and must be removed (cases cited, pp. 34, 46–50, *supra*).

CONCLUSION

It is respectfully submitted that the judgments of the court below should be reversed and the causes remanded with directions to enforce the Board's order in full.

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APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, U. S. C., Title 29, Sec. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

* * * * *

SEC. 10 * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall

state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

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(f) * * * the findings of the Board as to the facts, if supported by evidence, shall * * * be conclusive.

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